314 (13)

FILED
AUG 18 1941
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

October Term, 1941

No. 522

HERCULES MINING COMPANY, a corporation,
Petitioner,

vs.

UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

JOHN H. WOURMS,
PAUL B. JESSUP,
Counsel for Petitioner.

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In the Supreme Court of the United States

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HERCULES MINING COMPANY, a corporation,
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UNITED STATES OF AMERICA

Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States

The Hercules Mining Company, by its attorneys, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above cause on April 28, 1941.

OPINIONS BELOW

The opinion of the trial Court (R. 25) appears in 34 Fed. Supp. 103.

The opinion of the Ninth Circuit Court of Appeals (R. 146) appears in——— Fed. (2nd)———.

JURISDICTION

The judgment of the United States Circuit Court of Appeals for the Ninth Circuit was entered April 28, 1941. (R. 153.) A petition for rehearing was timely filed and an order denying the same was entered June 9, 1941. (R. 154.)

The statutory provision believed to sustain the jurisdiction of this Court is Section 240 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether a mining corporation, which due to economic conditions beyond its control, suspended the operation of the business it was organized to conduct, and engaged in no new business enterprise, but during the capital stock tax taxable years ending June 30, 1934 and 1935 devoted its time and efforts to the maintenance of its corporate existence

and protecting its property, carrying on only those activities which as a whole were reasonably necessary and incident to the accomplishment of that purpose, was doing business during such period of inactivity within the meaning and scope of Section 701 of the Revenue Act of 1934; c. 277, 48 Stat. 680, Sec. 701; U. S. C., Title 26, Sec. 1358.

STATUTE INVOLVED

Revenue Act of 1934, C. 277, 48 Stat. 680:

Sec. 701. Capital Stock Tax.

(a) For each year ending June 30, beginning with the year ending June 30, 1934, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * *

(U. S. C., Title 26, Sec. 1358.)

REGULATIONS INVOLVED

Regulations 64 (1934 Edition) Articles 31, 32, 33, 85 and 87:

ART. 31.—NATURE OF THE TAX—The tax is an excise tax imposed with respect to the carrying on or doing business by a corporation during any part of a taxable year ending June 30. It is an excise tax on carrying on or doing business and not on the business itself.

ART. 32.—APPLICATION OF THE TAX—The words "carrying on or doing business" must be

given their ordinary and natural significance. "Business" is a very comprehensive term and embraces whatever occupies the time, attention or labor of men for the purpose of livelihood or profit. In other words, business necessarily involves the idea of the pursuit of gain. If a corporation was organized for profit and is doing what it was principally organized to do in order to realize profit, it is doing business. * * *

ART. 33.—CARRYING ON OR DOING BUSINESS, ILLUSTRATED—Corporations organized for the purpose of, and actually engaged in, such activities as buying, selling or dealing in mineral or timber land or other real estate, leasing property; collecting rents, managing office buildings; and in some cases investing profits or surplus; are engaged in business within the meaning of the statute. No particular amount of business is required in order to bring a company within the terms of the Act. * * *

ART. 85.—NOT DOING BUSINESS—A domestic corporation not carrying on or doing business during any part of the period from May 10, 1934, to June 30, 1934, both dates inclusive, is not subject to the capital stock tax for the year ended June 30, 1934. A domestic corporation not carrying on or doing business during any part of a subsequent year ending June 30 is not subject to the capital stock tax for such year. A corporation, the activities of which are confined to holding property, receiving

income therefrom, and distributing such income, does not incur capital stock tax liability. However, if it should go beyond these limitations and engage in any business activities at any time, the tax will attach. No particular amount of business is required to incur tax liability.

ART. 87.—RETURN BY A CORPORATION NOT DOING BUSINESS—Whether a corporation is doing business within the meaning of the Act depends upon the activities engaged in during the particular year, and if a claim for exemption on that basis is sustained for one taxable year it does not necessarily follow that the corporation will be exempt in a subsequent year. Therefore, the collector will demand a return and the Commissioner will require detailed information disclosing all activities of such corporation each year regardless of the action on the claim for exemption for the previous year.

STATEMENT

This action was instituted in the District Court of the United States for the District of Idaho, Northern Division, against the United States for the recovery of capital stock taxes paid with interest and penalties for the capital stock tax taxable years ending June 30, 1934 and 1935, following the denial by the Commissioner of Internal Revenue of claims for refund filed by the Petitioner for the recovery of such taxes. (Finding 13, R. 41.)

The District Court found from the uncontroverted evidence adduced at the trial of the cause that Petitioner was organized for the purpose of engaging in the business of mining and had its office and principal place of business at Wallace, Idaho. (Finding 1, R. 33-34.) Prior to 1926 it carried on extensive mining operations in Shoshone County, Idaho. (Finding 2, R. 34.) Its mining operations were discontinued during the year 1925 due to the exhaustion of its ore body, following which exploratory and development work was carried on for the purpose of locating a possible extension of its ore body, but this work proved unsuccessful and was discontinued prior to the year 1933. (Finding 3, R. 34.) After the termination of its mining operations petitioner utilized its milling and concentrating facilities in operating a custom mill for the treatment of ore from other mines in the district. (Finding 4, R. 34.) These custom milling operations were suspended in September, 1932, due to the decline in base metal prices during this period of the depression, which resulted in the shutdown of mines which had been supplying ore for petitioner's custom mill. (Finding 4, R. 35.) This state of affairs continued until the latter part of the year 1935 when petitioner leased its milling facilities to another concern which operated the same until the latter part of the year 1936, and in May, 1937, petitioner resumed its custom milling

operations and continued to carry on the same from that date. (Finding 4, R. 35.) During the capital stock tax years ending June 30, 1934 and 1935, petitioner did not carry on any mining or milling activities (Finding 5, R. 35), and the transactions or activities carried on by it during these two taxable years, when considered as a whole, were solely for the purpose of, and incident to, the maintenance of its corporate existence, the ownership and holding of its property and the protection and preservation thereof, and were not for the purpose of acquiring profits. (Finding 12, R. 41.) From this the trial Court concluded that Petitioner was not carrying on or engaging in business within the meaning and scope of the capital stock tax law during the two years in question, and that the Commissioner of Internal Revenue erred in refusing to allow Petitioner's claims for refund for these unlawfully exacted capital stock taxes. (R. 43.)

On appeal the United States Circuit Court of Appeals for the Ninth Circuit had no dispute with the findings of the trial Court, but in reversing its decision held that inasmuch as the Petitioner had not disqualified itself from engaging in any of the activities permitted by its charter and was not in the process of liquidation, the conservation of its property during the period under review constituted the pursuit of its corporate end of ultimate profit, and hence amounted to the carrying on or doing of

business within the meaning and scope of the capital stock tax law, (R. 146)——— Fed. (2nd)———.

SPECIFICATION OF ERRORS

The Ninth Circuit Court of Appeals Erred:

1. In reversing the judgment of the trial Court.

2. In holding that the Petitioner was carrying on or doing business within the meaning and scope of Section 701 of the Revenue Act of 1934, C. 277, 48 Stat. 680, during the years ending June 30, 1934 and 1935.

REASONS FOR GRANTING THE WRIT

1. The decision of the Ninth Circuit Court of Appeals is in conflict with the principles of law enunciated by the United States Supreme Court in *Von Baumbach v. Sargent Land Co.*, 242 U. S. 503, 516; *Edwards v. Chile Copper Company*, 270 U. S. 452, 455; *McCoach v. Minehill & Schuylkill Haven Ry. Co.*, 228 U. S. 295, 305; *United States v. Pyne*, decided April 28, 1941, and reported in U. S. Supreme Court, Lawyer's Edition Advance Opinions, 1940-1941, Vol. 85, No. 15, pg. 834, 836.

2. The decision of the Circuit Court is also in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *Rose v. Nunnally Investment Company*, 22 Fed. (2nd) 102, 103, Certiorari denied, 276 U. S. 628; with the decision of the Circuit Court of Appeals for the Third Circuit in *United States v. Three Forks Coal Company*, 13 Fed. (2nd) 631; with the Ninth Circuit Court's

own decision in the case of *United States v. Hotchkiss Redwood Company*, 25 Fed. (2nd) 958, 959; and with a host of other Circuit Court of Appeals and District Court decisions too numerous to mention.

3. The decision of the Circuit Court is likewise in conflict with Articles 31, 32, 33, 85 and 87 of Regulations 64 (1934 Edition), outlining the Commissioner of Internal Revenue's interpretation of the capital stock tax law, and particularly what constitutes doing business thereunder.

4. The decision of the Circuit Court pursued to its logical conclusion would mean that every business corporation which had not disqualified itself from doing business under its charter and was not in the process of liquidation would be liable for capital stock taxes irrespective of the fact that it carried on no business during the capital stock tax year in question. Such an unwarranted and broad extension of the application of the established concept of what constitutes doing business under the law will result in interminable litigation unless such an eventuality is forestalled by this Court's granting certiorari in this case.

The Circuit Court lost sight of the fundamental principles that have been established by the decisions of this Court to guide it in its determination of whether or not a corporation is doing business under the capital stock tax law. If a corporation is organ-

ized for profit and does what it was principally organized to do in order to realize profit it is doing business regardless of the fact that profits may not be realized. *Edwards v. Chile Copper Company*, supra; Art. 32, Regulations 64. While if it has reduced its activities to the owning and holding of property and doing only those acts necessary to continue that status, it is not doing business under the law. *Von Baumbach v. Sargent Land Company*, supra; Article 85, Regulations 64. Activities necessary for and incident to the maintenance of a corporation's existence and the preservation or conservation of its property and engaged in for such purposes do not constitute doing business within the meaning and scope of the capital stock tax law. *United States v. Hotchkiss Redwood Company*, supra; *United States v. Three Forks Coal Company*, supra. These activities are merely necessary incidents to the ownership of property.

The extension of the concept of what constitutes doing business to such activities was expressly repudiated by this Court in the early case of *McCoach v. Minehill & Schuylkill Haven Ry. Co.*, supra; is inimical to the principles enunciated by this Court in *Edwards v. Chile Copper Company*, supra, and *Von Baumbach v. Sargent Land Company*, supra; and was inferentially repudiated in the recent decision of the Court in *United States v. Pyne*, supra.

The capital stock tax is imposed on a corporation

for doing business during a particular year, and each year that it believes itself exempt on the ground that it was not doing business a claim for exemption must be filed setting forth information respecting its activities during the year from which the Commissioner of Internal Revenue can determine whether or not such claim is substantiated, Articles 31, 85 and 87, Reg. 64. And the granting of a claim for exemption for one particular year does not imply that this status continues for the succeeding year or years for which separate claims for exemption must be filed with the Commissioner. See Article 87, Regulation 64.

In the instant case the petitioner was organized for profit, but during the two years subject to inquiry it was not doing what it was principally organized to do in order to realize profit, but was merely maintaining its corporate existence and conserving its property until such time as economic conditions would permit it to resume the pursuit of its corporate ends by operating the business it was principally organized to conduct, without which it could not hope to acquire profits, and consequently was not doing business under the principles enunciated by this Court or the Regulations promulgated by the Commissioner of Internal Revenue.

It is respectfully submitted that the writ should be granted.

JOHN H. WOURMS,
Of Counsel for Petitioner.

Due service and receipt of a copy of the within is hereby admitted this_____day of_____, 1941.

.....
Solicitor General of the United States.

.....
Assistant Solicitor General of the United States.

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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 522

HERCULES MINING COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for Idaho (R. 25–32) is reported in 34 F. Supp. 103. The opinion of the Circuit Court of Appeals (R. 146–152) is reported in 119 F. (2d) 288.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 28, 1941 (R. 153), and the order denying the petition for rehearing was entered on June 9, 1941 (R. 154). The petition for writ of certiorari was filed on August 18, 1941. The juris-

diction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, during the taxable years, the petitioner was carrying on business within the meaning of Section 701 (a) of the Revenue Act of 1934 and was thus subject to a capital stock tax.

STATUTE AND REGULATIONS INVOLVED

The statute and regulations involved are set forth in the Appendix, *infra*, pp. 9–12.

STATEMENT

The pertinent facts as found by the District Court are as follows (R. 33–42):

Petitioner, organized in 1923 under the laws of Delaware for the purpose of engaging in mining, carried on extensive mining operations prior to 1926. When the ore body became exhausted in 1925, petitioner spent considerable money in exploration and development on its property, but these activities proved unsuccessful and were abandoned prior to 1933 (R. 33–34).

After it ceased mining, petitioner used its milling and concentrating facilities by operating a custom mill for treating ore from other mines. But such milling was temporarily discontinued in 1932 because of the decline of prices for base metal. During the latter part of 1935, petitioner leased its

milling facilities and operations were carried on by the lessee for about a year. In May 1937, petitioner resumed, and since that time has continued, its custom milling (R. 34–35).

Petitioner is the owner of large underground workings and much mining equipment and machinery located both underground and on the surface. It also owns a number of dwelling houses, formerly occupied by employees, and has a building which has apartments for light housekeeping. For watching and maintenance of its property, petitioner spent $37,621.52 during the year ending June 30, 1934, and $32,750.54 during the year ending June 30, 1935 (R. 35–36). In addition, petitioner also spent $5,526.33 and $6,134.39 for office, legal, and general expenses in these two years respectively (R. 37). Petitioner also paid $534.99 to its president in the second taxable year as reimbursement for expenses incurred in connection with examination of mining property, and in the same year $393.37 was paid to one of the directors on a final accounting made for the purchase of stocks of other corporations in 1928 and 1929 (R. 40).

Petitioner's working capital and surplus funds were invested during the years in question in bonds and time certificates of deposit. These investments required attention since the income from them had to be collected and such income as well as the pro-

ceeds from matured bonds were reinvested. The petitioner also had a large investment in the stock of a newspaper in Wallace, Idaho, and in the stock of several inactive subsidiary companies. It was obliged to retain an office force to keep the corporate records of the latter companies and to provide supervision of their management (R. 36–37, 97).

Petitioner's gross income for the year ending June 30, 1934, amounted to $31,482.81 and for the year ending June 30, 1935, to $28,903.14. The major part of this income was received as interest but some was for rent on its buildings and in payment for old equipment which was sold (R. 37). Small amounts were also received for royalties from the occasional sale of ore mined by its employees (R. 39).

All work necessary to protect the property of petitioner's subsidiaries was carried on by it and the expenses for such work were charged to the subsidiaries at cost. Petitioners also made occasional loans to its subsidiaries without interest (R. 38).

When it closed its mill, petitioner had large quantities of fuel oil which it sold to its employees at cost, and when the supply was exhausted, further purchases were made and also sold at cost. This practice, however, was soon discontinued. Liberty Bonds of a par value of $23,000 were also sold during the taxable year at a profit of $228.81. (R. 39–40.)

Petitioner paid $1,110.33 for capital stock tax, interest and penalties for the year ending June 30, 1934, and $1,050.51 for the year ending June 30, 1935, after its timely claim for exemption had been denied by the Commissioner. The petitioner subsequently filed a claim for refund which was also rejected (R. 41–42).

The District Court held that the petitioner was not carrying on business within the meaning of the capital stock tax law (R. 43). The Circuit Court of Appeals reversed the decision of the District Court (R. 153).

ARGUMENT

Section 701 of the Revenue Act of 1934 (Appendix, *infra,* p. 9) imposes a tax on a domestic corporation "with respect to carrying on or doing business." "Business" is a very comprehensive term, *Flint* v. *Stone Tracy Co.,* 220 U. S. 107, 171; and a company's activities and organization must be judged as a whole to determine whether it is engaged in "business." *Edwards* v. *Chile Copper Co.,* 270 U. S. 452, 455–456.

Under these general principles petitioner was carrying on or doing business during the taxable years. Although it did not actually engage in mining or milling during the period, petitioner did not at any time indicate any intention to abandon its pursuit of gain. On the contrary, petitioner put its property to uses which either to a limited extent

yielded some immediate profits or which, to a greater degree, would enable it to enjoy future profits when it resumed its original activities. Pursuant to this plan petitioner kept an adequate office force and other employees; it kept the records for its subsidiary companies and managed their affairs; it loaned money to these companies; it invested and reinvested its fund and income therefrom in bonds and certificates of deposits; it sold some Liberty Bonds at a profit and made sales of some of its personal property; it leased some of its buildings and collected the rents from them; it kept its extensive property in good condition by making many repairs; it gave mining leases to former employees and collected small royalties upon the occasional sale of ore produced under the leases; its president made one inspection trip of mining property in California; and it met various obligations. It is immaterial that petitioner operated at a loss during these years since the ultimate objective of its activities and organization was eventually to realize gain. Contrary to petitioner's contention, therefore, the decision below is entirely consistent with the principle announced by this Court in *Edwards* v. *Chile Copper Co., supra,* and *Von Baumbach* v. *Sargent Land Co.,* 242 U. S. 503.

Petitioner further urges that the decision below conflicts with the decisions of this Court in *McCoach* v. *Minehill & S. H. R. Co.,* 228 U. S. 295, and *United States* v. *Pyne,* 313 U. S. 127, and with

the decisions of several circuit courts of appeals.[1] But in cases of this type, the decision in each instance must depend upon the peculiar facts before the court, *Von Baumbach* v. *Sargent Land Co.*, *supra*, at p. 516, and upon the particular statutory provisions involved. *Higgins* v. *Commissioner*, 312 U. S. 212, 217.

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[1] The cases cited as in conflict with the decision below are *Rose* v. *Nunnally Inv. Co.*, 22 F. (2d) 102 (C. C. A. 5), certiorari denied, 276 U. S. 628; *United States* v. *Three Forks Coal Co.*, 13 F. (2d) 631 (C. C. A. 3); and *United States* v. *Hotchkiss Redwood Co.*, 25 F. (2d) 958 (C. C. A. 9). But these cases presented differing facts. In any event, later decisions of the same and other courts establish the varying circumstances in which a corporation may be held to be subject to the tax and support a conclusion that petitioner here was doing or carrying on business. See *Lyon Lumber Co.* v. *Harrison*, 113 F. (2d) 443 (C. C. A. 7); *American Investment Securities Co.* v. *United States*, 112 F. (2d) 231 (C. C. A. 1); *United States* v. *Peabody Co.*, 104 F. (2d) 267 (C. C. A. 6); *Page* v. *M. Rich & Bros. Co.*, 99 F. (2d) 607 (C. C. A. 5); certiorari denied, 306 U. S. 662; *United States* v. *Atlantic Coast Line Co.*, 99 F. (2d) 6 (C. C. A. 4), revised on rehearing, 99 F. (2d) 932, certiorari denied, 306 U. S. 645; *New Haven Securities Co.* v. *Bitgood*, 87 F. (2d) 759 (C. C. A. 2); and *Harmar Coal Co.* v. *Heiner*, 34 F. (2d) 725 (C. C. A. 3), certiorari denied, 280 U. S. 610.

CONCLUSION

The court below correctly applied established principles to the special facts in this case. The petition should be denied.

Respectfully submitted.

CHARLES FAHY,
Acting Solicitor General.

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SEPTEMBER 1941.

APPENDIX

Revenue Act of 1934, 48 Stat. 680:

SEC. 701. CAPITAL STOCK TAX.

(a) For each year ending June 30, beginning with the year ending June 30, 1934, there is hereby imposed upon every domestic corporation with respect to carrying on or doing business for any part of such year an excise tax of $1 for each $1,000 of the adjusted declared value of its capital stock.

* * * * *

(U. S. C., Title 26, Sec. 1358.)

Treasury Regulations 64 (1934 Edition):

ART. 32. *Application of the tax.*—The words "carrying on or doing business" must be given their ordinary and natural significance. "Business" is a very comprehensive term and embraces whatever occupies the time, attention, or labor of men for the purpose of livelihood or profit. In other words, business necessarily involves the idea of the pursuit of gain. If a corporation was organized for profit and is doing what it was principally organized to do in order to realize profit, it is doing business.

As a general rule corporations are organized to do business, and ordinarily if a corporation has embarked in business its corporate organization is maintained to that end until the business is completed (as, for example, a real estate subdivision developed and sold), abandoned (as, for example, where prospective oil properties are proven

to be worthless), or turned over to another (as, for example, where the use and control of all its property is conveyed under a long-term lease), or the control and management of all its business and property are assumed by a Federal, State, Territorial, or court officer, either temporarily or for final liquidation (as, for example, a conservator, a trustee in bankruptcy, or a receiver).

If a corporation does not fall within one of the foregoing classes, but nevertheless claims exemption on the ground that it was entirely inactive during the whole of a taxable period, doing nothing more than holding its property, a detailed statement of its activities during the taxable period will be required. Any activities with respect to its properties or business other than such as are necessary to their protection and retention (as paying taxes thereon) will subject the corporation to the tax.

In most cases there will be no difficulty in determining whether a corporation is doing business. In cases where there is doubt the decision must necessarily depend upon the facts presented. Doing business (on or after May 10, 1934) for any part of a taxable year ending June 30 results in liability for the tax for the entire year.

* * * * *

A corporation that has retired from business is one that has changed its status, as, for instance, by divesting itself of all control over and management of the property formerly employed by it in the doing of business, and has reduced its activities accordingly.

* * * * *

ART. 33. *"Carrying on or doing business" illustrated.*—Corporations organized for the

purpose of, and actually engaged in, such activities as buying, selling, or dealing in mineral or timber land or other real estate; leasing property; collecting rents; managing office buildings; leasing lands and collecting royalties; managing wharves; and in some cases investing profits or surplus, are engaged in carrying on or doing business within the meaning of the statute. No particular amount of business is required in order to bring a company within the terms of the Act.

* * * * *

A corporation owning or managing real estate, which leases all of its property but under the terms of the lease is required to maintain or keep the property in repair, is doing business.

A corporation enaged in mining or in developing or speculating in mineral lands is doing business.

A corporation engaged in buying and selling securities or other property is doing business, even though for a period it makes no purchase or sale because of unfavorable market conditions.

* * * * *

A parent corporation which finances or manages the operations of its subsidiaries is doing business.

* * * * *

A corporation which has retired from its principal business (as, for example, the manufacture of automobiles) by turning that part of its business over to another is, nevertheless, doing business, if it engages in or carries on other activities which constitute doing business within the meaning of the Act.

ART. 85. *Not doing business.*—* * * A

corporation, the activities of which are confined to holding property, receiving income therefrom, and distributing such income, does not incur capital stock tax liability. However, if it should go beyond these limitations and engage in any business activities at any time, the tax will attach. No particular amount of business is required to incur tax liability.

U. S. GOVERNMENT PRINTING OFFICE: 1941